IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 42 of 1993

AND

INCOME TAX REFERENCE NO. 335 OF 1993

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME-TAX

Versus

GAEKWAD & COMPANY

Appearance:

1. INCOME TAX REFERENCE No. 42 of 1993
MR MANISH R BHATT for Petitioner
NOTICE SERVED for Respondent

1. INCOME TAX REFERENCE No. 42 of 1993
MR MANISH R BHATT for Petitioner
MR BD KARIA for Respondent

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 17/02/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The following question, identically worded in both the references, has been referred for the opinion of this Court by the Income Tax Appellate Tribunal under Section 256(2) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax, Baroda.

"Whether, on the facts and in the circumstances of the case and in law, the Appellate Tribunal is right in law in deleting the income from property known as "Jadhav Bungalow?"

2. The assessment years are 1980-81, 1981-82, 1982-83 and 1984-85 in Income Tax Reference No.42 of 1993 and 1979-80 in Income Tax Reference No.335 of 1993.

3. Heard Mr.M.R.Bhatt, the learned senior standing counsel for the applicant revenue in both the matters. Though served, there is no appearance on behalf of the respondent assessee in Income Tax Reference No.42 of 1993, while in Income Tax Reference No.335 of 1993, Mr.B.D.Karia, the learned advocate appears.

4. It is common ground between the parties that, in the impugned orders of the Tribunal, the Tribunal has not assigned any independent reasons, but merely followed its own order dated 7th March 1988 rendered in case of the assessee for assessment year 1977-78. As requested by the learned senior standing counsel, papers of Income Tax Application No.36 of 1989 have been called for to ascertain the position of the issue for assessment year 1977-78. It appears that though the Court has issued directions to refer question relatable to the property in question, either no reference has in fact been made or the same stands disposed of. Neither side is in a position to categorically state one way or the other. In the circumstances, with consent of the learned advocates appearing on behalf of the revenue and the assessee, a copy of the Tribunal's order for assessment years 1977-78 and 1978-79 dated 7th March 1988 has been taken on record.

5. Mr.Bhatt has very fairly invited our attention to the findings recorded by the Tribunal for assessment year 1977-78 as well as the decision of the Apex Court in case of Commissioner of Income Tax v. Podar Cement Pvt. Ltd., (1997) 226 ITR 625.

6. The relevant portion for assessment year 1977-78 of the Tribunal's order reads as under:

"9.2 At our instance, the learned counsel for the assessee had give a note in respect of this property, the sum and substance of which is (A) the assessee had purchased this property but it had not received the possession thereof. (B) Earlier this property belonged to one Shri Jadav. (C) Shri Jadav had sold this property to S/Shri S.B.Patel and C.B.Patel on 18-3-68. However, he had not handed over the possession of the property to the said parties. (D) The said parties had filed a civil suit against Shri Jadav for the said possession of the property or in the alternative to repay the amount which Shri Jadav had received from these parties by 25-12-69. (E) As Shri Jadav failed to do so, a decree was issued in favour of these parties. (F) Since these parties could not execute the decree, they agreed to transfer the property as well as the decree to a third party agreeable to Shri Jadav. (G) Thereafter, Shri Jadav suggested the name of the assessee to the said parties. (H) On 31-3-70, the said parties sold the said properties along with the decree obtained by them against Shri Jadav to the assessee. (I) Ever since then the assessee is trying to execute the decree and to obtain the possession of the property. (J) Shri Jadav and his various relatives have filed suits against the assessee and ultimately, the matter went upto the High Court and the High Court by its order dated 23-4-1982 stayed the proceedings in Special Darkhast No.170 of 1976 for taking the possession. The learned counsel for the assessee had also filed a copy of the public notice issued in Guj. Lokhsatta dated 4-9-86 wherein the aforesaid facts are narrated with a view to impress upon us that even till to date, the assessee is not in a position to exercise the rights of an owner on the said property."

"11. We have carefully considered the rival submission of the parties and the material

already brought on record and here also, we find considerable force in the submissions made on behalf of the assessee. In our view, the point at issue is fully covered by the aforesaid two decisions in the case of Jodha Mal Kuthiala. On the proper appreciation of the facts and circumstances obtaining in respect of this property, it cannot be disputed that the assessee was bit up a position to exercise the rights of owner on the said property, as he had not control over the same. Further, it is pertinent to note that in the A.Ys. 1972-73 to 1975-76, the assessee had not shown any income from this property and the same was accepted by the I.T.O. During the course of hearing, we were told by the learned counsel for the assessee that no remedial action has been attempted to take by the Revenue u/s 263 of the Act. Perhaps, on the ground that no such income could be estimated from this property. For all these reasons, we hold that the I.T. authorities were not justified in estimating the A.L.V. for this property and including the same in the total income of the assessee. We, therefore, delete the said income from the total income of the assessee in each of the years under appeal. "

7. The Tribunal has, therefore, applied the law laid down by Apex Court in case of Jodha Mal Kuthiala (R.B.) v. CIT [1971] 82 ITR 570 (SC), which has been explained and applied in the aforesaid decision in case of Podar Cement Pvt. Ltd. (supra). The ratio of the decision is that, having regard to the object of the Act to tax the income, "owner" is a person who is entitled to receive income from the property in his own right. Applying the aforesaid ratio to the facts recorded by the Tribunal, it is apparent that there is no infirmity in the view taken by the Tribunal which requires this Court to interfere. The Tribunal was justified in law in deleting the income from property known as "Jadhav Bungalow" considering the fact that the assessee herein is not in a position to exercise his right as an owner, at least for the years under consideration.

8. The question referred to the Court is, therefore, answered in the affirmative i.e. in favour of the assessee and against the revenue. The Reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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